

## COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

1570 Grant Street, Denver, CO 80203-1818 • (303) 866-2993 • (303) 866-4411 Fax John W. Hickenlooper, Governor • Susan E. Birch MBA, BSN, RN, Executive Director

October 27, 2011

Vikki Wachino, Director
Children and Adults Health Programs Group
Center for Medicaid and CHIP Services
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2349-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: CMS-2349-P Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010.

Dear Ms. Wachino:

I am writing to you on behalf of Colorado's single state Medicaid agency, the Department of Health Care Policy and Financing to provide comment related to CMS-2349 P *Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010* proposed regulations to implement sections of the Affordable Care Act (ACA) related to Medicaid and Children's Health Insurance Program (CHIP) eligibility, enrollment simplification, and coordination.

Colorado recognizes the enormity of the challenge to craft regulations implementing the health care coverage expansion intent of ACA and applauds CMS' efforts to define a consistent framework, balanced with a need to maintain State flexibility. However, there are a number of proposed provisions that would codify differences in approach and definition across Medicaid, CHIP and the Affordable Insurance Exchange (Exchange) that raise concern about unintended consequences for beneficiaries.

There is a lack of consistency on how the Exchange and Medicaid/CHIP will determine eligibility based on information collected from the Internal Revenue Service (IRS) to calculate modified adjusted gross income (MAGI). Medicaid should have the ability to use exactly the same financial formula as the Exchange. Further, CMS should take the opportunity to simplify the formula to calculate MAGI and not follow the strict IRS regulations for determining and reporting federal income tax obligations. CMS should look for flexibility to have MAGI generated by a fixed uniform formula with variable parameters converted to fixed parameters using national estimates. Gross income available on a standard IRS tax return could be converted to MAGI by a simple multiplication, using a fixed value determined by CMS through national estimates. Applying the same theory, an applicant/beneficiary's monthly pay stub could be converted to MAGI using a similar uniform formula approach to convert that amount to MAGI by a simple multiplication, using a fixed value determined by CMS through national estimates. Creating such conversion formulae would simplify the Medicaid eligibility process for States and applicants/beneficiaries. Colorado strongly suggests that CMS convene a group of State stakeholders to develop best practices in this area and not rely on current IRS regulations to set the new Medicaid eligibility financial formula.

- There is a lack of consistent approach on how family size will be considered in Medicaid and CHIP versus the Exchange for health insurance premium tax credits. While the proposed regulation preserves the historical Medicaid/CHIP approach, it does effectively push families with an expectant woman into Medicaid/CHIP at an income level that would otherwise be eligible for a premium tax credit through the Exchange absent her pregnancy status. At minimum, Colorado strong suggests that CMS ensure a consistent definition of household size across the programs. One option would be revision of the Health Insurance Premium Tax Credit regulations to treat household size for pregnant women in a manner that is consistent with Medicaid/CHIP. Colorado will also submit this comment in response to RIN 1545-BJ82 Health Insurance Premium Tax Credit.
- It is unclear from the proposed regulations and accompanying narrative how non-MAGI populations should be treated through the new eligibility processes. The proposed provisions under 42 CFR §435.911 state that eligibility should be determined through the new adult category prior to determining eligibility due to disability or need for Long-Term Care services yet fail to address how States should ascertain this information. Please confirm retention of the provisions of 42 CFR §435.608 requiring applicants to take necessary steps to obtain other benefits. In Colorado's experience applying for other benefits, including disability benefits, often results in eligibility for Medicare, SSI, or otherwise not being eligible for the new adult eligibility group. Colorado strongly suggests that CMS consider the requirements of 42 CFR §435.608 when creating the universal application to ensure sufficient information is captured to prompt referrals for disability and other benefits determinations.
- There is a mismatch on the approaches to Medicaid eligibility effective date in the regulations for Medicaid compared to the proposed Health Insurance Premium Tax Credit regulations. No revisions are proposed to 42 CFR §435.914 specifying retro-active eligibility for Medicaid, yet the proposed provisions of 26 CFR §1.36B-2(c)(2)(iii)(B) fail to adopt such retroactivity, instead viewing Medicaid coverage to be effective on the first day of the month after such application is approved. Colorado suggests that CMS revise 42 CFR §435.914 to include an effective date provision matching that of the proposed Health Insurance Premium Tax Credit regulation for those individuals migrating from health care coverage under the Exchange to Medicaid.
- Colorado is concerned about the negative consequences of frequent transitions between Medicaid enrollment and premium tax credit eligibility through the Exchange resulting from fluctuation in household income. Colorado suggests that CMS contemplate explicit inclusion of a State option to maintain individuals' Exchange health care coverage under the health insurance buy in (HIBI) authority of Section 1906 of the Social Security Act. Further, CMS should allow States the option to set an annual open enrollment and redetermination period for both Medicaid and the Exchange. If during the year, a beneficiary's income decreased to the Medicaid level, the State Medicaid agency would pay for the premium amount established through the Exchange and, if the beneficiary's income increased beyond the Medicaid level, the state Medicaid agency would receive the equivalent of the federal tax subsidy (through an increase in FFP) while maintaining the beneficiary's enrollment on Medicaid until the annual open enrollment and redetermination period. Such an option would allow the State Medicaid agency to process new applications and determinations during a fixed time in the year, and then decrease staffing levels to process income changes through the remainder of the year.
- The proposed options for determining qualifying expenditures for the Federal financial participation rate (FFP) related to the "new expansion adult population" in 42 CFR §433 Subpart E are flawed. Specifically, the regulations contemplate an apparent estimation of the population and associated expenditures in perpetuity. At some point both CMS and the States need to move away from using estimates. Colorado strongly suggests that CMS convene a group of State stakeholders to develop best practices in this area.
- Colorado suggests that the revisions proposed to 42 CFR §435 Subpart B are incomplete. As proposed, reference to *Aid to Families with Dependent Children* (AFDC) remains in several sections with retention of States' obligation to provide Medicaid coverage for those populations. Please clarify

whether this was an oversight or whether it is CMS' intent that States continue to determine Medicaid eligibility under these requirements as well as those proposed using the methodology of modified adjusted gross income (MAGI). Colorado is specifically interested in the effect on program rules for eligibility under the authority of Title XIX Section 1931 of the Social Security Act (AKA 1931 program). The regulatory provisions implementing the "1931 program" were not deleted or modified under the Affordable Care Act. As a result, there is considerable question about how those beneficiaries eligible under the provision of the "1931 program" should be treated under both MAGI and AFDC rules. CMS should consider taking an active role in recommending that provisions for this program be removed through legislative change and/or clarify in rule specifically how the "1931 program" should be administered through both MAGI and AFDC rules. CMS should also provide clarifying information on how these new eligibility processes will affect the Transitional Medicaid program and if MAGI calculations should be used for this population as well.

• There are multiple paragraphs within the proposed regulations where Colorado perceives there are opportunities not taken to better align language and definition between Medicaid and CHIP. If an explicit intent of the proposed regulations is to simplify eligibility/enrollment and improve coordination, Colorado suggests making changes to improve the consistency of language use, definition and approach.

In addition to those overarching concerns, Colorado has specific comments on the proposed regulations as follows:

§430.10(c) Determination of eligibility. Please clarify that retention of the single State agency responsibility for eligibility determination does not compromise the ability of an Exchange to screen for and determine Medicaid eligibility if the individual applies via the Exchange. Colorado suggests that the use of "or" in the regulatory provisions of §430.10(c)(1)(i), (ii) and (iii) is misleading.

§430.10(d)(5) Agreements with Federal or State and local agencies. Colorado strongly recommends deletion of the requirement that merit protection principles are employed by the agency responsible for Medicaid eligibility determination. The proposed requirement fails to recognize the anticipated new landscape of entities authorized to conduct health care coverage eligibility determination and enrollment activities.

§433.204 **Definitions**. Colorado suggests adding the phrase "under the provisions of §435.119" in the definition of *Newly Eligible Individual*.

§433.206(b) Choice of Methodology. Colorado notes the provision requires State submission of its methodology choice to CMS for approval but there is no apparent timeline for CMS response to said request for approval. Colorado suggests adding language specifying a timeframe for CMS response.

§433.208(c) Threshold Methodology. Colorado is able to identify each person meeting the requirements for newly eligible and is able to track such individuals' expenditures directly, including their status at the time of the expenditure. Please include of a subparagraph option that reflects a State's ability to accurately identify claims eligible for the enhanced federal match without needing to rely on estimates and annualization of such estimates. Colorado strongly suggests that CMS convene a group of State stakeholders to develop best practices in this area to eliminate an ongoing need to use estimates. Colorado perceives making an investment in doing so will resolve any potential issues around fairness and equity across States in appropriate drawing of FFP.

§435.218 Individuals above 133 percent FPL. Please clarify the intended Federal financial participation rate for this optional coverage group. Specifically, will the enhanced FMAP rates specified in 42 CFR §433.10 for the mandatory newly eligible adult group apply?

§435.403(i) State residence. Current Colorado eligibility practice conforms to the proposed regulatory requirement for *intended* State of residence, including when individuals under age 21 attend school in a State other that where the parents live. Colorado is concerned that the proposed continued State flexibility around school attendance undermines the desired consistent framework for health insurance coverage. Colorado strongly recommends CMS address this to ensure a consistent approach for such individuals.

§435.603 Application of modified adjusted gross income (MAGI). Colorado strongly recommends CMS work to better align these provisions with those proposed in the Health Insurance Premium Tax Credit regulations at 26 CFR §1.36 –B. The inconsistencies in determination of household membership, family size, and countable income undermine the Affordable Care Act intent to simplify and coordinate access to health care coverage. Colorado will also submit this comment in response to RIN 1545-BJ82 Health Insurance Premium Tax Credit.

§435.907(d)(2) Application. Colorado notes that the technology for telephonic signature is costly. Please clarify whether Federal financial participation (FFP) is allowable for such expenditures.

§435.907(d)(5) Application. Please remove the requirement of *via facsimile* for application submission. Colorado perceives the facsimile submission option to be both outdated and vulnerable to unintended exposure of confidential information due to submission errors.

§435.908(b) Assistance with application and redetermination. Please clarify the expected manner of assistance provided for online application and redetermination activities; would such technologies as a "help menu" be sufficient or is it CMS' expectation that there be online chat or real time interactive assistance capabilities.

§435.911 Determination of eligibility. Colorado strongly suggests that CMS retain a universal standard maximum allowable definition for *promptly and without undue delay*, such as the historical 45 days. At minimum, please clarify whether States may define a standard for *promptly and without undue delay* via State Plan Amendment. Colorado recognizes the expectation that eligibility decisions will be greatly expedited under the new provisions but is concerned about the development of different standards across and within States as the result of judicial interpretation absent a well-defined universal standard.

§435.914 Effective date. Please add a new provision for Medicaid eligibility effective date that matches 26 CFR §1.36B-2(c)(2)(iii)(B) specifying that an individual transitioning from advance payment of a health insurance premium tax credit is eligible for Medicaid on the first day of the calendar month beginning after the approval determination.

§435.916(a)(4) Periodic redeterminations of Medicaid eligibility. Please clarify the anticipated rigor of "assessment" for other insurance affordability programs. Colorado is concerned about a need for duplication of effort, of technology such as "rules engines," and of secure data storage at both the State and the Exchange. Also, Colorado strongly suggests revising the requirement for transmission of data to a requirement for mechanisms that make the data available electronically. Colorado perceives it would be better to have an active referral to other insurance affordability programs coupled with the capability to retrieve the relevant information. Colorado notes that a transmission of data requirement carries the implication that the State Medicaid agency is responsible for storing all applicant/beneficiary information and sending that information

out. Colorado suggests allowing an option for a central information repository available for query to all programs defined as *insurance affordability programs* under 42 CFR §435.4.

§435.945(b) General requirements. Please clarify whether a State may continue to require documentation in accordance with State statutory requirements and that "self-attestation or attestation by a responsible party on behalf of the applicant/beneficiary" is an option rather than a mandate.

§435.945(e) General requirements. Please clarify if the intent of this subparagraph is an assurance that an applicant/beneficiary will not be asked to bear the costs of any information matching conducted by the State Medicaid agency.

§435.948(c)(2) Verifying financial information. Colorado notes that in its experience it is not feasible to match data through an interface without a social security number.

§435.949 Verification of information through an electronic service. Please clarify whether the mandated use of this HHS Secretary-established electronic service will be provided free of charge to States.

§435.952(b) Use of information and requests of additional information from individuals. Please clarify the anticipated standard for "reasonably compatible" information in light of the dual requirements for using such information in eligibility decisions and for maintaining a State's program integrity responsibilities.

§435.1200(e) Medicaid agency responsibilities. Colorado is concerned about a need for duplication of rules engines and secure data storage at both the State and the Exchange implied by the required capability to receive an applicant's electronic account from the Exchange. Colorado is concerned about expected transmission/receipt of all information provided on an application, without regard to relevancy to eligibility decisions. Colorado strongly suggests revising the requirement for receipt of an electronic account to a requirement for mechanisms that allow for retrieval of the electronic data. Colorado perceives it would be better to have an active referral between the State Medicaid agency and other insurance affordability programs coupled with the capability to retrieve only that information which is relevant and necessary. Colorado suggests allowing an option for a central information repository available for query to all programs defined as insurance affordability programs under 42 CFR §435.4.

§435.1200(f) Medicaid agency responsibilities. Colorado strongly suggests that CMS retain a universal standard maximum allowable definition for *promptly and without undue delay*, such as the historical 45 days. At minimum, please clarify whether States may define a standard for *promptly and without undue delay* via State Plan Amendment. Colorado recognizes the expectation that eligibility decisions will be greatly expedited under the new provisions but is concerned about the development of different standards across and within States as the result of judicial interpretation absent a well-defined universal standard.

§435.1200(f)(1) Medicaid agency responsibilities. Colorado is concerned about the need to transmit "all information on the Medicaid application" rather than the "necessary information on the Medicaid application".

§435.1200(g)(1) Medicaid agency responsibilities. Please clarify the anticipated rigor of "assessment" for other insurance affordability programs. Colorado is concerned about a need for duplication of rules engines at both the State and the Exchange. Also, Colorado strongly suggests revising the requirement for receipt and transmission of data to a requirement for mechanisms that make the data available electronically. Colorado perceives it would be better to have an active referral to other insurance affordability programs coupled with the capability to retrieve the relevant information.

- §435.1200(g)(2)(i) Medicaid agency responsibilities. Please clarify expectations around the apparent conflict between a required assessment/referral to the Exchange for health care coverage for individuals who are waiting for decision on their SSI applications, which often includes a period of retroactive Medicaid eligibility. Colorado notes that coordination of care and of payment for services obligations in such circumstances may be very problematic, particularly if the needed services are not covered benefits under the Exchange health plan.
- §457.320(d) Other eligibility standards. Colorado strongly recommends revising the provisions around CHIP residency for children to match those proposed in Medicaid at §435.403(i). Additionally, please update the terminology for "ward of a State" to "in the custody and care of a State" to match references typical in programs funded through the Administration for Children and Families.
- §457.340(a) Application for and enrollment in CHIP. Please clarify the expected manner of assistance provided for online application activities; would such technologies as a "help menu" be sufficient or is it CMS' expectation that there be online chat or real time interactive assistance capabilities.
- §457.343 Periodic redetermination of CHIP eligibility. As previously noted, Colorado strongly recommends revising the provision for receipt and *transmission of data* to a requirement for mechanisms that make the data available electronically. Colorado perceives it would be better to have an active referral to other insurance affordability programs coupled with the capability to retrieve the relevant information. Colorado suggests allowing an option for a central information repository available for query to all programs defined as *insurance affordability programs* under 42 CFR §435.4.
- §457.348 Determination of CHIP eligibility from other applicable health coverage programs. As previously noted, Colorado strongly recommends revising the requirements for transmission of data to a requirement for mechanisms that make the data available electronically. In addition, Colorado strongly suggests that CMS retain a universal standard maximum allowable definition for promptly and without undue delay, such as the Medicaid historical 45 days. At minimum, please clarify whether States may define a standard for promptly and without undue delay via CHIP State Plan Amendment. Colorado recognizes the expectation that eligibility decisions will be greatly expedited under the new provisions but is concerned about the development of different standards across and within States as the result of judicial interpretation absent a well-defined universal standard.
- §457.350 Eligibility screening and enrollment in other insurance affordability programs. Colorado strongly recommends revision of this paragraph to ensure it does not drive duplication of effort, duplicative rules engines or other complexities. Colorado perceives it would be better to have an active referral to other insurance affordability programs rather that elaborate mechanisms to receive and transmit data.
- §457.350(i) and (j) Eligibility screening and enrollment in other insurance affordability programs. Colorado notes an apparent typographical error in both provisions stating "is not screened as potentially eligible for Medicaid." Colorado's understanding is that applicants <u>must</u> first be screened for Medicaid and suggests the correct language should be "is screened and found potentially not eligible for Medicaid."
- §457.380(a) Eligibility verification. Colorado strongly recommends this subparagraph be revised to mirror the language proposed for §435.945(b): Except with respect to citizenship and immigration status information, and subject to the verification requirements set forth in §435.945, the agency may accept attestation without requiring further paper documentation (either self-attestation by the applicant or beneficiary or by a parent, caretaker or other person acting responsibly on behalf of an applicant or beneficiary) of all information needed to determine the eligibility of an applicant or beneficiary for CHIP.

§457.380(c) Eligibility verification. Colorado strongly recommends this subparagraph be revised to mirror the residency language proposed for Medicaid in §435.403. Having different standards for permissibility of stated intent for residency between the Medicaid and CHIP programs compromises the ACA intent for simplified and seamless insurance affordability programs.

§457.380(g) Eligibility verification. Please clarify whether the mandated use of this HHS Secretary-established electronic service will be provided free of charge to States.

Thank you for the opportunity to provide comment on concerns and suggested changes to the proposed rules on Medicaid Program eligibility changes under the Affordable Care Act. Should you have any questions, I can be reached at <a href="mailto:Barbara.prehmus@state.co.us">Barbara.prehmus@state.co.us</a> or via telephone at (303) 866-2991.

Sincerely,

Barbara B. Prehmus, M.P.H.

Federal Policy & Rules Officer

Cc: Ms. Susan E. Birch, MBA, BSN, RN, Executive Director

Ms. Lorez Meinhold, Deputy Policy Director, Governor's Office of Policy and Initiatives,

Colorado Governor John W. Hickenlooper

Ms. Cynthia Mann, Center for Medicaid, CHIP, Survey & Certification

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